

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRIAN P. KEMP, ET AL.,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT JUDGE

MAY 10, 2018

6:23 P.M.

MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED

TRANSCRIPT PRODUCED BY:

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UNITED STATES DISTRICT COURT
OFFICIAL CERTIFIED TRANSCRIPT

A P P E A R A N C E S O F C O U N S E L

FOR THE PLAINTIFFS DONNA CURLING, DONNA PRICE, JEFFREY SCHOENBERG:

CATHERINE CHAPPLE
MORRISON & FOERSTER, LLP

HALSEY G. KNAPP, JR.
KREVOLIN & HORST, LLC

FOR THE PLAINTIFF COALITION FOR GOOD GOVERNANCE:

BRUCE P. BROWN
BRUCE P. BROWN LAW

FOR THE PLAINTIFFS COALITION FOR GOOD GOVERNANCE, LAURA DIGGES, WILLIAM DIGGES, III, AND RICARDO DAVIS:

CARY ICHTER
ICHTER DAVIS, LLC

FOR THE STATE OF GEORGIA DEFENDANTS:

JOHN FRANK SALTER, JR.
THE BARNES LAW GROUP, LLC

FOR THE FULTON COUNTY DEFENDANTS:

CHERYL RINGER
OFFICE OF THE FULTON COUNTY ATTORNEY

(...CONT'D...)

(...CONT'D...)

FOR THE DEKALB COUNTY DEFENDANTS:

LAURA JOHNSON
DEKALB COUNTY DEPARTMENT OF LAW

FOR THE COBB COUNTY DEFENDANTS:

DANIEL WALTER WHITE
HAYNIE LITCHFIELD & WHITE

**FOR THE DEFENDANT MERLE KING, IN HIS INDIVIDUAL CAPACITY AND
HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE CENTER FOR
ELECTION SYSTEMS AT KENNESAW STATE UNIVERSITY:**

GRANT EDWARD SCHNELL
HOLLAND & KNIGHT, LLP

P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; May 10, 2018.)

THE COURT: Have a seat.

All right. We're having a status conference on preservation issues. This is *Donna Curling, et al. vs. Brian Kemp*, Civil Action File Number 1:17-CV-2989. I have a chart here with everyone's names. So I think in the interest of time I'm not going to make everyone repeat that.

Do you have a joint report about where you are at?

MR. SALTER: I think we do. I think there was one objection that my friends for the Coalition want to put on the record of some nature.

If you want me to lead off first, Bruce?

MR. BROWN: Yes. Go ahead.

MR. SALTER: Your Honor, I don't normally do this in federal court much, how you go about approaching.

May I show you a document?

THE COURT: Sure. Just give it to Ms. McConochie.

MR. SALTER: I don't want to be tackled.

That is a document that we understand that may be -- it is posted at a precinct after -- after things are being shut down I understand. And it links a serial number with some votes and a -- and the precinct. And what I understand is the plaintiffs would -- are asking in terms of facilitating their --

1 THE COURT: I'm just going to make this -- do you
2 mind if I make this an exhibit?

3 MR. SALTER: I would like a copy back at some point
4 so I can walk home with it. But we can provide a copy to you.

5 THE COURT: We'll make it as Joint Exhibit Number 1?

6 COURTROOM DEPUTY CLERK: Whose is it, Your Honor?

7 MR. SALTER: You keep that. Cary has got another for
8 me.

9 THE COURT: So is this your exhibit? Coalition's
10 Exhibit Number 1?

11 MR. ICHTER: Yes.

12 THE COURT: Any objections to its admission?

13 MR. KNAPP: No, Your Honor.

14 THE COURT: All right. It is admitted.

15 MR. SALTER: Are we okay on that?

16 MS. RINGER: Yes.

17 MR. SALTER: Your Honor, what we're trying to do is
18 to figure out and ascertain in order for them to try to link up
19 votes, precincts, and machines whether or not we can go and get
20 this document in an easy route or a hard route.

21 THE COURT: You mean ones for every single machine?
22 Is that -- is this what this is?

23 MR. SALTER: What that is --

24 THE COURT: Or is this the summary total for each
25 precinct that was posted on the board or something like that

1 that used to be actually even the vote on the door?

2 MR. SALTER: The logistical question is can we get
3 that. We think we can. We don't think we have an objection to
4 letting the -- facilitating that going to the plaintiffs.

5 MR. ICHTER: Those are per machine.

6 MR. SALTER: So there's going to be a lot of them.
7 The question is: Is there a way to feasibly get that to the
8 plaintiff so that they -- their experts can be informed and
9 they can facilitate culling down what machines they would need
10 in order to sample them?

11 There are two possible routes that we are going to
12 investigate. My deadline is to tell them whether or not there
13 is an easy way or a hard way in order -- can we facilitate
14 that. That is Wednesday at noon.

15 I'm going to try to tell them whether or not there is
16 a server at each county that we can go to -- are we able to go
17 there and then print that off and get that to them so they can
18 deliver that to them. That is Wednesday by noon getting it to
19 them. It is telling them can we do it by server in each county
20 of the three counties or are we going to have to go find a way
21 cooperating with the plaintiffs' side -- both plaintiff groups,
22 go to the superior courts where this is sealed after each
23 election and find it and get it and is that feasible.

24 My report by Wednesday at noon next week is to say --
25 report back with the Secretary of State's technical people can

1 we do this the easy way or whether we're going to do it the
2 hard way.

3 Now let me point one thing out to you, which I think
4 this is one of -- I'm glad you are sitting down. I think we
5 have a semblance of interest here. This is not something where
6 I think you're going to have a hard time with us on timing.
7 And the reason is --

8 THE COURT: I'm just going to let Ms. Burgess see
9 what has been produced so she understands what we're talking
10 about.

11 Go ahead.

12 MR. SALTER: Right now I think all three of the
13 counties, Fulton, Cobb, and Dekalb, are at least out of
14 extremis right now in terms of going forward in the next few
15 days going through this election in May.

16 So I think that they can stand down. I think the
17 notice, I think, was filed by Dekalb last week or week before.
18 I think they are okay right now.

19 One thing I want to put on the record -- so I think
20 we're doing that. But we're still going to have to deal with
21 things coming up. I mean, there will be a runoff. There will
22 be a November election. So we're not interested in dragging
23 our feet. So I think we can make that report --

24 THE COURT: You're not interested in dragging your
25 feet? I just wanted to hear you.

1 MR. SALTER: No. So there you go.

2 So we're going to make that report to my friends on
3 the other side by Wednesday at noon as to whether or not we
4 think we can download this and produce it or whether or not we
5 are going to have to go to each superior court in the three
6 counties.

7 One thing I have -- I want to put on the record to
8 our -- that may provide my clients and perhaps the county some
9 latitude is that we have agreed jointly with both of the
10 plaintiff groups that if it becomes feasible for the Secretary
11 of State to triage DRE machines from other counties of the
12 state, i.e., counties that are not Cobb, Fulton, or Dekalb --
13 that if we were able to do that, that would not be a violation
14 of any of the holds or the preservation obligations.

15 In other words, if we can get those machines and
16 bring them in and put them into use, that is not going to
17 violate any of our obligations of preservation. I'm not saying
18 it can be done. We're going to investigate whether or not it
19 is feasible. We are still spread thin. But maybe we can rob
20 Peter to pay Paul a little bit and not run afoul of any
21 preservation obligation.

22 THE COURT: Just so we're not kind of all on edge all
23 the time, we are fine for this election and we're fine through
24 the runoff; is that -- I mean, the runoff, as we all recognize,
25 usually has a smaller number of voters.

1 So it is really the -- it is the general election
2 that we will end up having -- we don't want to wait until the
3 last moment. We don't want to go through this again.

4 MR. SALTER: Well, I don't either. But there is a --
5 depending upon the runoff volume and the county, that could be
6 a problem. One thing to that question as to whether or not we
7 are going to have -- I think we're going to be clear of May.
8 The runoff is subject to one county in particular we're worried
9 about battery levels. And they are checking that right now.
10 We think we're going to get by. If it will be, it'll be by the
11 skin of our teeth. But I think we can get through May on that.

12 THE COURT: When is the runoff?

13 MS. RINGER: July.

14 THE COURT: July.

15 MR. SALTER: And there is going to be a runoff.

16 THE COURT: There is going to be a runoff. So we
17 really need to -- I don't want to wait until June 20th to be
18 dealing with that. So we are going to --

19 MR. SALTER: We agree. Everybody knows that our
20 people will get freed up more once the May or logistically we
21 will have more latitude and be able to be more responsive and
22 liaison with our people a little better once the May election
23 results are certified and those people have more down time.

24 I want to put one more ask of the plaintiffs. I
25 think this is more the Coalition plaintiffs and not the

1 Curling. We have asked -- there is a question as to -- on our
2 side as to why the Coalition plaintiffs have a litigation hold
3 that includes optical scanning machines that are not DRE
4 machines.

5 They have got, I think, a systemic concern in terms
6 of preservation. We don't see that as part of the complaint.
7 But they have agreed to caucus and get us an answer in a week
8 as to whether or not that should continue to be part of their
9 hold demand and, if so, what will be the scale of it and can
10 they narrow the scope and what is the reasoning for that in
11 terms of the complaint.

12 Is that fair?

13 MR. BROWN: That is fair, John.

14 THE COURT: So what is your time frame for responding
15 to that?

16 MR. BROWN: We can respond by Tuesday, Your Honor.

17 THE COURT: All right.

18 MR. SALTER: With that, there is a detail ask of
19 David -- I think Catherine presented on behalf of Curling. But
20 it is joint, as I understand. And I may mangle this. So
21 Catherine can feel free to come push me off the microphone.

22 But basically what they are trying to achieve is a
23 list of the machines used by each of the counties, Cobb,
24 Fulton, and Dekalb, that would provide a serial number of every
25 machine, what election it was -- all the elections that they

1 were used in, back to and including November 2016 to the
2 present -- or through May or through July? That just occurred
3 to me.

4 MS. CHAPPLE: What works? Through May?

5 MR. SALTER: We should have asked that.

6 **(There was a brief pause in the proceedings.)**

7 MS. CHAPPLE: It would have to obviously be after.

8 MR. WHITE: For Cobb County, our concern that I
9 raised in there is we do know there is one state reg that is
10 applicable that says, after you do testing, you can't give the
11 serial -- you can't reproduce the serial number. So we could
12 not produce a list of the serial numbers and precincts for May
13 until after the May election.

14 MR. SALTER: After the May.

15 MS. CHAPPLE: And if --

16 MR. SALTER: It will probably be after May anyway.

17 MS. CHAPPLE: Right.

18 MR. BROWN: So include May.

19 MR. SALTER: Include May. Understood.

20 Okay. Does that make sense?

21 THE COURT: Yes.

22 MR. SALTER: So basically that would be the time
23 frame, but it will be serial number for machine; elections
24 used -- where that machine was used; the last election used,
25 which would be May; and whether or not it was sequestered,

1 which is a whole thing but --

2 MS. CHAPPLE: And precinct.

3 MR. SALTER: And precinct. Thank you. And that
4 precinct thing -- that is why we're trying to get some of these
5 records to be able to show -- put serial number with precincts
6 and so on and so forth.

7 Am I missing anything else?

8 All right. That is what we're driving towards.

9 THE COURT: So is the anticipation then that with
10 this information that you will be able to -- that the
11 plaintiffs will be able to give a sample so that you can, in
12 fact, free some of the machines?

13 MR. SALTER: Yes. And I want to put one thing on the
14 record. Then I know Bruce has one thing he wants to put on the
15 record. I think Bruce is going to have maybe some sort of
16 objection just for the record that preserves something or
17 other.

18 We have not elicited a warranty or guaranty or really
19 even much of an idea as to how many machines they are going to
20 ultimately ask for. And so we are moving forward in good faith
21 that that will not be onerous. We're leaving that for another
22 day. That is not decided yet for a lot of practical reasons
23 but also so we could have an agreement that we could present to
24 Your Honor.

25 We are going to work towards and drive towards

1 getting them this information in the hopes that that good faith
2 will be returned. And I hope it will be, and I expect it will
3 be.

4 I think that is all if Bruce -- is there anything
5 else?

6 MS. CHAPPLE: Can I just -- to Mr. Salter's last
7 point, we -- the Curling plaintiffs just really appreciate
8 everyone today in the spirit of cooperation. And as soon as we
9 get that information, we're going to process it quickly and
10 get, you know, the numbers so that we can release them.

11 THE COURT: So what is your target date? Because I'm
12 just -- I don't want things to collapse at the last moment.

13 MS. CHAPPLE: Right. So --

14 MR. SALTER: The good thing is we're in agreement --
15 both of us are motivated on the time because we are going to
16 head into November. Our interest is to try to give them data
17 so that they can tell us how many and then release -- kind of
18 like to Pharaoh, let my people go, with the machines. And they
19 want -- their interest is in getting the data.

20 So I don't think this is a problem where both sides
21 are not interested in getting the --

22 THE COURT: But are you concerned about the July
23 primary? That is what I'm --

24 MR. SALTER: Yes. It is still -- I can't warrant
25 that. And we still have some issues where we might be pulling

1 through by the skin of our teeth to get machines.

2 THE COURT: So you are thinking --

3 MR. SALTER: We don't think this is doomed to fail.

4 THE COURT: No. I understand that. But they are
5 going to be giving data in June -- I guess early June that
6 would include May. So I'm just looking at the -- that is why
7 I'm just looking at the time frame.

8 So are we talking about, like, the 7th of June? I
9 don't know.

10 MR. SALTER: I can't warrant that, Judge, because
11 we're still not sure whether we're going to have to go the long
12 route or the short route to get them the precinct, serial
13 number --

14 THE COURT: All right. Well, if you could -- I know
15 we've resolved the problem for the emergency for this immediate
16 election. But I think you -- once you have all investigated
17 next week, I think you do have to have some type of outer
18 schedule so that we are not here on the cusp of July 4th.

19 MR. SALTER: We don't want to be here.

20 THE COURT: It has to be resolved.

21 MS. CHAPPLE: Could we submit sort of a joint
22 status --

23 THE COURT: Sure.

24 MS. CHAPPLE: -- update on -- after Wednesday -- on
25 Wednesday so -- after we know whether -- or Thursday?

1 Thursday?

2 MS. RINGER: Thursday.

3 MS. CHAPPLE: Thursday.

4 THE COURT: That is fine. Very good.

5 MR. SALTER: May I sit, Your Honor?

6 THE COURT: Yes, you may.

7 MS. CHAPPLE: May I also sit?

8 THE COURT: Yes, of course. Any time.

9 MR. BROWN: Your Honor, Bruce Brown for the Coalition
10 plaintiffs. And we had worked together with the Curling
11 plaintiffs to arrive at this process.

12 The one thing that we have concern about is that the
13 timing of this is such that in our view the defendants have in
14 a sense run out the clock on the May 22nd election. And by
15 doing that, there is a whole nother group of machines that have
16 gone from being what we think should have been preserved to
17 being used in an election. And we don't know the impact that
18 using the machines has upon their stored memory. We asked for
19 that information. We don't have it. It could be that there is
20 some memory that is retained.

21 So that being the case, there is an opportunity that
22 those defendants have between now and the election to give us
23 the information that we would need to select a relatively small
24 sample of those not to disturb but just to switch out so that
25 the machines that we would select to switch out could be

1 preserved by looking at the data or by copying the data.

2 THE COURT: Switch out with what?

3 MR. BROWN: With other machines that are innocuous,
4 that are not controversial. So that would --

5 THE COURT: And where do the innocuous ones come
6 from? From some other counties?

7 MR. BROWN: It could come from another county or from
8 somewhere else.

9 THE COURT: Is that what they are looking at in part
10 to see if there are these -- when Mr. Salter says that they are
11 going to talk to the Secretary of State's office to see whether
12 there are machines available? I'm not clear.

13 MR. BROWN: Yes. I don't think they -- well, no, I
14 don't think -- I'm not representing that the defendants have
15 agreed to this. But we would -- we would suggest that it is a
16 big move for a defendant to take a disputed piece of evidence
17 and move it away from discovery. And this is one way that they
18 could mitigate whatever harm that might cause.

19 Thank you, Your Honor.

20 MR. SALTER: Your Honor, Halsey wanted me -- I
21 thought I said it, but I want to make double sure. It matters.
22 That the litigation hold as to both parties does not apply
23 except as to Fulton, Cobb, and Dekalb. We are clear on that.

24 MR. BROWN: That is correct, Your Honor.

25 MR. KNAPP: That is correct, Your Honor.

1 THE COURT: All right. Good.

2 MR. SALTER: And that would allow us to investigate
3 whether or not -- and I don't know whether we can -- whether or
4 not there are other machines that can be used.

5 THE COURT: And we're talking about trying to do this
6 for the May 22nd election? No?

7 MR. SALTER: No. I don't think that is feasible.

8 THE COURT: Or we're talking about this for the
9 general election or for the runoff?

10 MR. SALTER: Any time.

11 THE COURT: Any time?

12 MR. SALTER: Any time.

13 THE COURT: All right. Well, I don't -- you know,
14 knowing the way that the state is, I mean, it is great that
15 they can try to do it for the 22nd. I don't know whether I
16 would -- hope springs eternal.

17 MR. SALTER: I think it would be hard to tell
18 counties right now to have to count on those machines and we --

19 THE COURT: I think to -- to think about it for the
20 summer -- I mean, for the July runoff or for the fall -- I
21 mean, I do need to reiterate. This is still -- you know, this
22 is -- my interest was making sure that the information was
23 preserved. I don't know what is going to happen yet. But I
24 could not allow the information not to be preserved.

25 I know that -- I will reiterate again that it would

1 be in my mind virtually impossible to have a trial before the
2 November election in time to do anything with that. But we
3 will get something out on the status of the third amended
4 complaint. And also basically, you know, the thing about it
5 is -- at this juncture is the defendant has made -- the state
6 has made clear at the very least that they have planned to
7 reassert their sovereign immunity defenses no matter what. So
8 there is no avoiding the fact that there is a substantial order
9 that I have to deal with. And that is just -- that is the way
10 it is.

11 And I really commend you-all on great work today, on
12 the plaintiffs keeping it together, and we're not having two
13 different fronts that would make it impossible.

14 MR. SALTER: We appreciate that too, Judge.

15 THE COURT: So -- but all of these are significant
16 challenges in moving this forward, as if it wasn't already a
17 very difficult subject.

18 I think I have looked at every election case I could
19 that was even comparable to this. And I understand that the
20 landscape here is changing in terms of some of the concerns and
21 the world at large that we're facing. But these are daunting
22 and usually not successful cases.

23 So it is not like I can just say, oh, hey, that has
24 no basis, let's just proceed ahead. That is -- it is not like
25 that. I just have to make sure that we are -- the information

1 is preserved in the event the claims -- any portion of the
2 claims went forward that the information was there.

3 And I really do appreciate greatly your coming down
4 really at the 11th hour. I think it was obviously productive.
5 And no more phone conferences with 20 people on the phone.
6 Totally unproductive.

7 So most appreciated. Thank you for flying in,
8 Ms. Chapple. I'm sure there may be other people who did too
9 I'm not aware of. Let me know what your schedule is. And
10 really the end of Friday -- the end of Thursday is fine. There
11 is no rush once we -- unless something explodes. And I am not
12 expecting it to explode.

13 This is on the record. I'm taking -- basically
14 adopting what you have said as the order of the Court, that
15 that is the agreement and what you -- that has been set forth.
16 There are some portions of the agreement that are obviously
17 still in motion.

18 But the agreement at base still is that there is --
19 that the current computers -- computers that are voting
20 machines that are on hold will stay on hold. And there is --
21 and they will not be put into play in an upcoming immediate
22 election on the 22nd of May and that you have a procedure
23 agreed upon for determining what data -- a variety of data that
24 would be necessary for the plaintiffs to be able to identify a
25 sample so that we can not be holding all of these voting

1 machines ad nauseam into the future.

2 And that is -- so I basically approve of the general
3 terms of the agreement as the order of the Court. And only so
4 that there is not any misconception, I do consider that that is
5 a commitment on everyone's part.

6 MR. SALTER: At the risk of opening up a can of
7 worms, the hold thing is a mess. I'm just going to tell you.

8 THE COURT: Is a mess?

9 MR. SALTER: Yeah. What is on hold is a bit of a
10 sticky wicket with each different county. But I'll just put
11 that out there for the record.

12 THE COURT: Well, after I got Dekalb's note, I
13 started wondering about that myself.

14 But let me -- without opening up a can of worms or a
15 sticky wicket, there are machines that are not -- that have
16 been held back without regard to what room they are in?

17 MR. SALTER: We are certainly -- not we, but the
18 counties have been certainly holding back every machine that
19 they possibly can because we want to try to preempt this
20 dispute to the extent that it is possible for us to do. And --

21 THE COURT: Well, I trust that given the
22 aggressiveness of the plaintiffs' counsel on this issue that if
23 there was something they needed to bring to my attention they
24 would at this point.

25 All right. Well, thank you very much. We'll see you

1 probably sooner rather than later. But I hope not.

2 MR. SALTER: Thank you, Your Honor.

3 COURTROOM SECURITY OFFICER: All rise. Court is in
4 recess.

5 **(The proceedings were thereby concluded at 6:46**
6 **P.M.)**

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C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 21 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 11th day of May, 2018.

Shannon R. Welch

SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
OFFICIAL CERTIFIED TRANSCRIPT